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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 788

HORST VON HENNIG, Ancillary Executor of the Estate of Carlo von Wedekind, Deceased, *Petitioner*,

v.

ROBERT F. KENNEDY, Attorney General of the United States as Successor to the Alien Property Custodian

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Horst von Hennig, Ancillary Executor of the Estate of Carlo von Wedekind, appellant below, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court are reported at 187 F. Supp. 914 (D.D.C. 1960) and are also set forth, together with the judgment of that court, at pages 41-47 of the certified transcript of the record herein (R 41-47). The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 296 F. 2d 420, and is also set forth, together with the judgment of the court, at pages 243-246 of the certified transcript of record herein (R 243-246) and in Appendix A hereto (pp. 1a-3a, *infra*).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit, affirming the District Court, was dated and entered October 19, 1961. The plaintiff-appellant's timely petition for rehearing or rehearing *en banc*, filed on November 3, 1961, was denied by orders dated and entered December 11, 1961. The jurisdiction of this Court is invoked under Tit. 28 U.S.C. Secs. 1254(1) and 2101(e).

QUESTIONS PRESENTED

Whether a neutral, who was a 50 per cent owner of and performed or was empowered to perform certain supervisory acts with respect to, a firm doing business within Italy during World War II, was a friendly alien at common law in relation to his personal assets in the United States which were not in any way connected with the Italian firm, and therefore under the protection of the Fifth Amendment.

Whether, assuming such a neutral is entitled to the protection of the Fifth Amendment, and considering the constructional preference against confiscation,

redefinition of the common law concept of friendly alien, by which the Court below sustained the confiscation of the neutral's American property, was authorized by Congress or justified by the exigencies of war.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fifth Amendment to the Constitution of the United States, and Sections 2(a), 9(a) and 39 of the Trading with the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 2(a), 9(a) and 39 (1958) which are set forth in Appendix B hereto (pp. 4a-7a, *infra*).

STATEMENT OF THE CASE

This is an action brought under Section 9(a) of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. Section 9(a) (hereinafter sometimes "the Act"), to recover some $1,100,000 representing the proceeds in liquidation of 5,000 shares of stock of the Empire State Properties and Trading Corporation ("Empire"), a New York corporation, and certain bank accounts representing dividends on those shares, vested by defendant's predecessor in office (R 17, 21). The property in question was vested on the ground that it belonged to the brother and sister (German residents and admitted enemies) of the original plaintiff, Carlo von Wedekind (hereinafter "Carlo"), now deceased (R 16). Carlo asserted his claim of ownership to the property. In discovery proceedings some 14,000 documents were furnished the Government and the depositions of nine witnesses were taken in Europe. Subsequently, the Government moved for summary judgment on the ground that Carlo was ineligible to

maintain his action because of "doing business within" enemy territory during the war. The motion was denied upon the ground that there were material issues of fact (R 27). Following that, the issue of eligibility to maintain this action—whether Carlo was an "enemy" within the meaning of the Act—the only issue herein, was separated from the issue of ownership for trial (R 28).

After trial the District Court found that during wartime Carlo was doing business within enemy territory, namely Italy, and was, therefore, ineligible to maintain the present action (R 41-47). The appeal was argued on May 15, 1961. On August 22, 1961, the Clerk of the Court at the request of the panel which heard the case, asked attorneys for both sides for comments on a point which had not been briefed. The requested briefing was completed on September 22, 1961. On October 19, 1961, the Court, by a *per curiam* decision, affirmed the District Court (R 243-246) stating, *inter alia*,

> "We think that under all the circumstances the original plaintiff could properly be found to be doing business in Italy during wartime, and hence to be an 'enemy' under the Act." (R 245-246)

A petition for rehearing or rehearing *en banc*, stressing the constitutional question raised herein, was denied on December 11, 1961 (R 263-264).

Carlo, a German national but a long-time resident of Switzerland (R 29), inherited from his father a 50 per cent interest in Carlo Wedekind & Co., a small Sicilian retail business dealing in pumps, wine presses and electrical appliances and engaged in the export from Sicily of some Sicilian fruits (R 75). The Company was a small one having at most five employees during

the period here in question (R 53). It had been founded by Carlo's grandfather in 1829 (R 30) and was organized under Italian law as a *societa in nome collettivo* (hereinafter "*societa*") (R 30, 39), which is a form of Italian business organization having certain characteristics of both a common law corporation and a partnership (R 83-109). Both the District Court and the Court below attached significance to the fact that, under Italian law, if the *societa's* assets were insufficient to meet its obligations, Carlo and his brother were each personally liable (R 44, 245). The *societa* engaged in business within Sicily for many years, including a period of time when the United States and Italy were at war (R 65-66). The *societa* was not a profitable enterprise. In fact the record shows that it was not maintained for profit but for sentimental reasons stemming from the fact that it was founded by Carlo's grandfather whose name it bore (R 53). After World War II the firm was eventually liquidated and, as a result of the liquidation, Carlo and his brother, who owned the other 50 per cent, each received the lira equivalent of about $500 (R 66, 67).

Since sometime in 1935, the *societa* was managed by one Mueller, a resident of Sicily, who had been given a power of attorney for that purpose (R 52-53, 189). While the power of attorney was signed by Carlo, he did so in his capacity of "representing the company" (R 189). The power did not authorize any act on behalf of Carlo personally (R 88). Prior to the outbreak of the war in Europe, Carlo visited Italy perhaps once a year (R 132). After the outbreak of the war in Europe, he was never in Italy until after hostilities ceased (R 31, 64). During the period of hostilities, some correspondence was exchanged between Carlo

and Mueller (R 164-185). There are but two letters in the record from Mueller to Carlo during the critical period, *i.e.*, December 11, 1941, until the end of hostilities with Italy (R 179, 181). One of the two letters from Mueller to Carlo refers to two letters written by Carlo to Mueller during the critical period (R 181). They were not found and were not introduced at the trial.

The Court below referred to the fact that the record showed that Carlo fixed Mueller's salary and himself paid a monthly bonus of 200 Swiss Francs to Mueller through a Swiss firm which Carlo dominated and controlled (R 245). The Court also stated:

> "* * * It seems also that he must have retained continuing power to revoke the authority delegated to Mueller and to appoint a new manager. The original plaintiff's active supervision of the business prior to the war was clearly shown to exist, and although during the war period his visits to Italy ceased and his correspondence with Mueller was perhaps more limited, he did not show that his power of supervision over the business was materially changed * * *." (R 245)

There was no connection whatsoever between the American property which was vested and the Italian firm. The American property at vesting consisted of 5,000 shares (one-half of the stock) of Empire which was a company holding stocks in various American corporations, and certain bank accounts representing dividends paid on the Empire shares (R 11, 21). The Italian firm was engaged in retailing electrical appliances, pumps and wine presses and exporting some Sicilian fruit (R 75). There were no dealings between Empire and the Italian company. The former was

in no way responsible for the debts of the latter and no correspondence was exchanged between them. The only connection between the two was that Carlo owned 50 per cent of the Italian firm and claimed to own 100 per cent of the vested property. There was no other connection.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT BELOW RAISED IMPORTANT CONSTITUTIONAL QUESTIONS IN HOLDING THAT THE AMERICAN PROPERTY OF A NEUTRAL IS WITHOUT CONSTITUTIONAL PROTECTION AGAINST ITS TAKING WITHOUT THE PAYMENT OF JUST COMPENSATION BECAUSE OF THE NEUTRAL'S FIFTY PER CENT OWNERSHIP OF AND ACTIVITIES IN CONNECTION WITH A WHOLLY UNRELATED ENEMY ENTERPRISE

A. The Nature of the Constitutional Question.

Carlo's right, under the Fifth Amendment, to just compensation for private property taken for public use was violated by the decision of the Court below, thus an important constitutional question has been decided which should be reviewed by this Court and reversed. The decision below held that a neutral was an enemy with respect to his personal assets in the United States amounting to $1,100,000 because of his 50 per cent interest in and activities with respect to, a firm doing business within enemy territory (Italy). Under common law, personal assets which are unconnected with a neutral's enemy business do not have enemy status, and therefore the property in question is entitled to the protection of the Fifth Amendment. By sanctioning a new or redefinition of the common and international law concept of enemy status the Court below in effect removed the neutral's property from the protection of the Fifth Amendment. As this redefinition

of enemy status was neither clearly and unequivocally authorized by Congress nor justified by the exigencies of war, the decision of the Court below violated Carlo's rights under the Fifth Amendment.

The constitutional question which this case raises is the same as this Court faced in *Guessefeldt* v. *McGrath*, 342 U.S. 308, 72 S. Ct. 338, 96 L. ed. 342 (1952). There a German national resident within the United States, but actually present within Germany during the last war, brought an action under Section 9(a) of the Trading with the Enemy Act for the return of his property which the Government had vested. The Government contended that a German national, even though resident in the United States, could not recover his seized property because Congress had provided in Section 39 of the Act that no return of vested property could be made to a national of Germany or Japan. This Court held that in view of this contention "a decision for the Government would require us to decide debatable constitutional questions." (at p. 317) After reviewing the cases establishing a friendly alien's right to the protection of the Fifth Amendment (see p. 10, *infra*) as well as the conflicting judicial precedents on whether a national of an enemy country resident in the United States was an enemy at common law, this Court said that "Certainly, the constitutional problem is not imaginary, and the claim not frivolous which would have to be rejected to decide in the Government's favor." (at p. 319). Since an enemy national resident within the United States was entitled to the protection of the Fifth Amendent if such a person was not an enemy at common law and, after considering the ambiguous legislative history of Section 39, this Court held that, "Considering that confiscation is not easily to

be assumed" the provisions of that section should be construed to exclude from enemy status a national of an enemy country who was resident within the United States during hostilities.

There can be no doubt that under common law enemy status did not attach to the personal assets of a neutral located in the United States and which were not in any way connected with an enemy business in which the neutral had a 50 per cent interest and over which he exercised, or was empowered to exercise, a certain supervision. See pp. 11-15, *infra*. Contrast the doubts which this Court expressed and resolved in *Guessefeldt*. Therefore it cannot be denied that by sustaining a departure from the common law concept of enemy, the decision of the Court below removed the petitioner's property from the protection of the Fifth Amendment which it would have otherwise enjoyed. The constitutional questions in this case are not merely debatable, they are crystal clear. In addition, just as in *Guessefeldt*, where this Court analyzed the ambiguous legislative history of Section 39 and found no clear and unequivocal intention of Congress to authorize the confiscation of the property of a national of an enemy country resident within the United States during hostilities, so too, in this case, the legislative history of Section 2(a) of the original act shows no clear and unequivocal Congressional intention to authorize the confiscation of the property here involved. See p. 16, *infra*.

The question of the constitutional limitations on the power to confiscate property which was not enemy under common law and therefore under the protection of the Fifth Amendment was also raised in *Miller* v. *United States* (U.S.), 11 Wall. 268, 20 L. ed. 135 (1871). This Court said that it was unnecessary to answer

the constitutional issue inasmuch as it held that the claimant was an enemy under common law and that, although the power of Congress to authorize confiscation was limited to the property of enemies, there could be no question of the right to confiscate the property of a person who was an enemy under common law. However, in the years between the *Miller* case and the *Guessefeldt* case, some rules have emerged concerning the constitutional limits on the Government's power to authorize confiscation under the War Power. This Court has held that friendly aliens whose property is taken by the Government are entitled to the protection of the Fifth Amendment to the Constitution and that just compensation must be made to them. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 51 S. Ct. 229, 75 L. ed. 473 (1931). This Court has also held that a non-enemy must be given an effective judicial remedy for the seizure of his property in the exigency of war. *Becker Steel Co. v. Cummings*, 296 U.S. 74, 80 L. ed. 54, 56 S. Ct. 15 (1935); see also *Henkels v. Sutherland*, 271 U.S. 298, 70 L. ed. 953, 46 S. Ct. 524 (1926); *Central Union Trust Co. v. Garvan*, 254 U.S. 544, 65 L. ed. 403, 41 S. Ct. 214 (1929); *Stockr v. Wallace*, 255 U.S. 239, 65 L. ed. 604, 41 S. Ct. 293 (1921).

Thus, it has been established that Congress may only confiscate the property of enemies and that friendly aliens are entitled to the protection of the Fifth Amendment for the taking of their property for public use without just compensation. A redefinition of the concept of enemy removing the property of a neutral, which under common law was not enemy and therefore under the protection of the Fifth Amendment, is unconstitutional unless the redefinition is clearly and

unequivocally authorized by Congress and a reasonable relationship exists between the cause for the confiscation authorized and the threat which the property poses to the nation's security. See *Silesian American Corp.* v. *Clark*, 332 U.S. 469, 476, 68 S. Ct. 179, 92 L. ed. 81, 86 (1947) and *Hirabayashi* v. *United States*, 320 U.S. 81, 87 L. ed. 1774, 63 S. Ct. 1375 (1943). In the instant case, there is no clear and unequivocal Congressional authorization and the exigencies of war did not require that the property be confiscated. The property is, therefore, entitled to constitutional protection.

B. At Common Law Carlo's American Property Was Not Subject to Confiscation as Enemy Property.

It is a well settled proposition at common law that a neutral resident having a business in enemy territory had a commercial domicile there but enemy status applied only with respect to property which was the concern of or appertained to the business located in enemy territory. As to all other property he enjoyed the full rights of a neutral. That doctrine has a long history in England and the United States. Lord Porter noted, "That goods, the property of neutrals, are condemnable only if they have such a *connexion* with the enemy house of trade has been recognized from the days of Lord Stowell in England, and for a period of similar length in America." *Part Cargo ex M.V. Glenroy* v. *Spencer* [1945] A.C. 124, 138. This statement was made in commenting upon the argument of a neutral corporation, with a separately incorporated subsidiary in enemy territory, that the seized goods did not belong to the enemy branch and were not sufficiently connected with the business of the enemy branch to make them enemy property.

As early as 1800, the British court in *The Portland*, 3 C. Rob. 41, 165 Eng. Rep. 378 (1800) was squarely presented with the question of whether to confiscate the property of a neutral which was unconnected with the enemy house of trade in which the neutral was associated. The rule which was there enunciated has since been followed on both sides of the Atlantic. The court, per Sir William Scott (later Lord Stowell) stated the rule as follows:

> "In the present case, as far as the person is concerned, there is a neutral residence; as far as the commerce is concerned, the nature of the transaction, and the destination, are perfectly neutral: unless it can be said that trading in an enemy's commerce, makes the man, as to all his concerns, an enemy; or that being engaged in a house of trade in the enemy's country, would give a general character to all his transactions: I do not see how the consequences of Mr. Ostermeyer's [the claimant] trading to Ostend [enemy territory] can affect his commerce in other parts of the world. *I know of no case, nor of any principle, that could support such a proposition as this, that a man, having a house of trade in the enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well as in those which belonged to his belligerent domicile.*" (at pp. 44-45, emphasis added.)

The doctrine, so formulated, was followed in *The Magnolia* [1916] P. 329; *The Anglo-Mexican* [1918] A.C. 422; and *The Lützow* [1948] A.C. 435, all common law seizure cases arising out of World War I. *The Portland*, *supra*, was also cited and followed in *Part Cargo ex M. V. Glenroy v. Spencer*, *supra*, a case arising out of World War II. Several of these cases were concerned with the additional problem of whether the

particular property seized was or was not the concern of the enemy trade of the neutral claimant. This question does not enter into the instant case since it is certain beyond all doubt, and the Government has never claimed otherwise, that the proceeds in liquidation of the shares of stock of the American corporation which are the subject of this action were in no way either directly or indirectly connected with Carlo Wedekind & Co., the enemy house of trade.

In *The Friendschaft* (Moreira claimant), 4 Wheat. 105, 4 L. ed. 525 (1819), a person who was a partner in an enemy firm claimed, by reason of his neutral domicile, his share of the value of certain seized property belonging to the firm. In rejecting this argument, Mr. Justice Story said:

> "It has been long since decided in the courts of admiralty that the property of a house of trade established in the enemy's country, is condemnable as prize, whatever may be the domicile of the partners. The trade of such a house is deemed essentially as hostile trade, *and the property engaged in it* is, therefore, treated as enemy's property, notwithstanding the neutral domicile of any of the company." (at p. 107, emphasis added.)

Mr. Justice Story, citing *The Portland*, *supra*, stated the principle even more clearly in his often quoted dictum that:

> "[I]f a person be a partner in a house of trade in the enemy's country, he is, as to the concerns and trade of that house, deemed an enemy, and his share is liable to confiscation, as such, notwithstanding his own residence is in a neutral country: for the domicile of the house is considered in this respect as the domicile of the partners." Pratt's

ed. of Story, pp. 60-61 (1854), 2 Wheat. Appendix 28-29, 4 L. ed. 290.

See also Kent's Commentary on International Law, pp. 202, 203. And, in the *Prize Cases*, 2 Black 635, 17 L. ed. 459 (1862), this Court at one point was concerned with the claim of a neutral to a portion of the seized cargo. The Court noted that:

> "[W]e are of the opinion that the firm of Ludlum & Watson, doing business in Richmond, where Watson, the active member of the firm, resided, must be ruled by his status *in reference to the property of the firm under his control* in the enemy country." (at 17 L. ed. 481, emphasis added.)

In *Juragua Iron Co. v. United States*, 212 U.S. 297, 29 S. Ct. 385, 53 L. ed. 520 (1909), a corporation organized in the United States and doing business in both the United States and Cuba sued for compensation for property destroyed due to the military operations of American troops. It was in these circumstances that this Court had occasion to make the following observations:

> "In Whiting's War Powers under the Constitution, 340, 342, the author says: 'A foreigner may have his personal or permanent domicil in one country, and, at the same time, his constructive or mercantile domicil in another. The national character of a merchant, *so far as relates to his property engaged in trade*, is determined by his commercial domicil.'", (at pp. 307-308, emphasis added.)

If it is assumed that Carlo was doing business within Italy by virtue of his relationship with Carlo Wedekind & Co., it must be conceded that, to that extent, he had an enemy trade domicile in Italy. However,

proceeding on this assumption, it must also be recognized, in the light of the common and international law rules set out above, that only the property which appertained to or was the concern of the neutral's enemy business was subject to confiscation as enemy property. That part of a neutral's property which did not appertain to or was not the concern of a neutral's enemy trade domicile was not subject to confiscation as enemy property. Therefore, at common law, the property of Carlo von Wedekind, which was vested by the Government in this case, and which neither appertained to, nor was the concern of, Carlo Wedekind & Co., was not enemy property and was not subject to confiscation.

Since the property claimed by petitioner was not enemy under common law it was protected by the Fifth Amendment, *Russian Volunteer Fleet* v. *United States*, *supra*. Therefore it must be concluded, as it was in *Guessefeldt* v. *McGrath*, *supra*, that the confiscation of such property raises important constitutional questions. In the light of these issues, this Court there expressed a constructional preference for avoiding confiscation in the following words:

> "Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited." (p. 319)

A fair reading of the Act will support an interpretation which excludes from enemy status the personal assets of a neutral which are not in any way connected with the neutral's enemy firm. This seems clear not only as a matter of statutory construction which prefers to avoid confiscation, but it is doubly clear because this construction proclaims the common law.

II

THE LEGISLATIVE HISTORY AND THE GOVERNMENT'S WARTIME POLICIES SHOW THAT A DEPARTURE FROM THE COMMON LAW RULE WAS NEITHER INTENDED BY CONGRESS NOR JUSTIFIED BY WARTIME EXIGENCIES

A. The Legislative History Shows That Congress Did Not Intend to Depart From the Common Law Rule.

There is no clear and unequivocal mandate from Congress to confiscate the property here involved. The legislative history of the Act shows that Congress, by including in the definition of enemy a neutral "doing business within" enemy territory, did not intend to go beyond the rules of the common law. Any changes from those rules were in the direction of mitigation. Moreover, the definition of "enemy" in the original Act was only for purposes of wartime regulation. The principal concern of the Act was to prohibit trade and financial transactions between United States residents and persons and firms outside the United States which could benefit the enemy war effort. Accordingly, Congress defined the latter as "enemy" for the purpose of prohibiting trade and business transactions except under license issued by the Executive. Moreover, property located in the United States belonging to "enemies" could be vested and held in custody by the Alien Property Custodian (sometimes referred to in the legislative history as "protective")[1] but there was no expression of any intention that it thereby be confiscated.

It is elementary that there must be specific statutory authority in order to exercise the power of confiscation. *Brown* v. *United States*, (U.S.) 8 Cranch 110, 129, 3 L. ed. 504 (1814); *The Adventurer*, (U.S.) 8 Cranch

[1] See H. Rep. 85, 65th Cong., 1st Sess. 1 (1917); S. Rep. 113, 65th Cong., 1st Sess. 6-7 (1917).

221, 228, 229, 3 L. ed. 542 (1814); *Miller* v. *United States*, *supra*; *Silesian American Corp.* v. *Clark*, *supra*. The legislative history shows no Congressional intention to depart from the common law rule by the use of the phrase "doing business within" enemy territory to define enemy. Assistant Attorney General Charles Warren, the author of the bill which became the Act, testified:

> "[Doing business within] means having a branch or agency within such territory . . .
>
> "[W]e use the words 'doing business in' because those words have been given a definite meaning by our Supreme Court, and I was surprised to find that anyone misunderstood them." (Hearings before Subcommittee of the Senate Committee on Interstate and Foreign Commerce on H.R. 4960, 65th Cong. 1st Sess. 137 (1917), hereinafter "Senate Hearings")

Similarly, the Senate Committee which passed upon the bill that became the Act, said with respect to the definition of "enemy" in Section 2(a):

> "Doing business within Germany, of course, means having a branch or agency actively conducting business within that country. The bill does not bring within the term enemy a neutral, unless such neutral has a branch of its business within Germany." S. Rep. 113, 65th Cong. 1st Sess. 4 (1917).[2]

[2] It would seem that Congress was interested primarily in corporations, or, at least, intended to apply the corporate tests for "doing business within" to individuals and various forms of business organizations. At the time of the passage of the Act this Court had clearly interpreted the phrase, "doing business within" to mean that a wholly owned subsidiary doing business within a given territory (state) did not constitute doing business within that same territory by the parent. *International Harvester Co.* v. *Kentucky*, 234 U.S. 579, 58 L. ed. 1479, 34 S. Ct. 944 (1914); *Peterson* v. *Chicago, R.I. & P.R. Co.*, 205 U.S. 364, 51 L. ed. 841, 27 S. Ct. 513 (1907).

Under common law, if a person had a branch or agency in enemy territory, he acquired enemy status by virtue of his enemy commercial domicile. *The Portland, supra; The Friendschaft, supra.* Likewise under the Act enemy status is acquired by virtue of a neutral having a branch or agency in enemy territory. It has never been contended that Carlo Wedekind & Co., the Sicilian mercantile house [one-half of which Carlo inherited from his father] was a branch or agency of Carlo, the neutral investor. Therefore, it cannot be said that Carlo's personal assets in the United States appertained to or were the concern of Carlo Wedekind & Co.

As shown above, under the common law rules enemy status derived from "doing business within" the enemy's territory applied only to those assets which were the concern of or appertained to the enemy business (see pp. 11-15, *supra*). Considering that under the Act a neutral acquired enemy status in the same way as it was acquired under the common law, it would appear that no change was intended in the effect which enemy status resulting from "doing business within" enemy territory would have with respect to a neutral's personal assets in the United States which were not in any way related to the neutral's enemy business enterprise.

Nothing could make this clearer than the amendment to Section 2 of the Act offered by Congressman Parker and incorporated into the Act as passed. Congressman Parker advocated that neutrals should not be allowed to do business within both the United States and Germany, but he emphasized that it should also be made clear that a neutral doing business within Germany

was to be an "enemy" but for a limited purpose only. He said:

> "The United States wants to say to the world, 'You can deal with Germany or you can deal with us, but you cannot deal with both at the same time'. * * * * I think it is very important, first, that the bill should not say that every businessman is an enemy because he does business with Germany, but that it should say only that for the purpose of trading, he is regarded as one. Therefore, I suggest that the words 'for the purpose of such trade and of this Act' shall be inserted." (55 Cong. Rec. 4910)

The amendment, "for the purpose of such trade and of this Act" makes it clear that enemy status does not apply to a neutral's personal assets in the United States which were not in any way related to the neutral's business enterprise which was "doing business within" Germany.

Petitioner does not contend that Congress intended to restrict the common law rule with respect to the extent to which enemy status attached to the property of a person or firm "doing business within" enemy territory. An unsuccessful attempt to do just that was made by Congressman Lenroot in an amendment which was adopted in the House but deleted in the Senate. The proposed restriction is shown in that part of the floor debates between Congressman Lenroot and Congressman Montague, (Floor Manager of the bill in the House) set out in the margin.[3]

[3] The essence of these discussions is found in the following dialogue:

> "Mr. Lenroot: I call the gentleman's attention to the consequences of Section 7, where it renders void any contract or

Congressman Lenroot's proposal was designed to restrict the operation of the Act to that property of the neutral which was actually owned by the branch or agency doing business within Germany. Even under common law, enemy status would have extended to all property which was the concern of or appertained to the enemy enterprise. Congressman Parker described the amendment as proposing a prohibition on a neutral's business activities only in "so far as trade with Germany is concerned."[4] Assistant Attorney General Warren, in opposing that amendment said in testimony before the Senate Committee that:

> "The reason that it was adopted [in the House] was that Congressman Lenroot stated that the old cases on international law only termed a man an enemy insofar as he had property in the enemy's country." (Senate Hearings, p. 134.)

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payment made to any enemy. To illustrate, a citizen of Denmark; we will say, has an agent doing business in Germany, a very small percentage of his business and a business which he has the right to do under international law; but he has had business dealings with American citizens, not with relation to this business which he has done with Germany, but entirely foreign to it. Under the bill as it stands it renders void every contract, irrespective of the kind of business to which the Denmark subject is engaged, and treats him as an enemy, not only so far as business done with Germany but all business done.

"Mr. Montague: I can only repeat that a neutral carrying on business in Germany is an enemy under this bill, and because he does business, the larger part of the business as to that, with citizens of friendly countries does not alter his enemy character. It would be impossible to separate or distinguish his enemy business from his neutral business. His credit, his solvency, could not be separated and apportioned. He had in law a business residence in Germany, and of necessity he must, *quoad this business*, stand as other residents of Germany." (55 Cong. Rec. 4843, emphasis added.)

[4] 55 Cong. Rec. 4910.

Even in the floor discussion, Congressman Montague, in answering Congressman Lenroot's contention, made it clear that all the property of a business that had an enemy branch or agency acquired enemy status under the Act. He said that a person doing business within Germany had,

> "in law a business residence in Germany, and of necessity he must, *quoad this business*, stand as other residents of Germany." (55 Cong. Rec. 4843, emphasis added.)

Thus it is clear that Congress intended that enemy status would attach to all the assets that appertained to or were the concern of a business enterprise of a neutral doing business in enemy territory. Enemy status in such a situation applied "*quoad this business*", but enemy status did not apply to the personal assets of the neutral which were separate and distinct from those of the firm doing business within enemy territory. The testimony of Assistant Attorney General Warren is consistent with this interpretation. (Senate Hearings pp. 132-135). Nowhere in his testimony is there any indication that the Act was intended to bring within its scope personal assets or property which were entirely separate and distinct from the firm which was "doing business within" enemy territory. This is confirmed, moreover, by the House Report on the bill which became the Trading with the Enemy Act which states:

> "To summarize, the purpose of the bill is not to create new international rules or practices but to define and mitigate them." (H.R. Rep. 85, 65th Cong. 1st Sess. 2 (1917))

It would thus appear that no changes in the international and common law rules regarding the application

of enemy status to neutrals and their property was contemplated. There was no Congressional mandate, clear or otherwise, authorizing a departure from the international and common law rules to confiscate the property of a neutral such as is here involved.

Even assuming, however, that other inferences could be drawn from the floor debates on the bill, the legislative history leaves no doubt that the definition of enemy was intended for regulatory purposes only and that any injustices and inequities could be dealt with by a liberal licensing policy. There was never any intention that the Act as passed would serve as a basis for confiscation. Both Secretary of State Lansing[5] and Assistant Attorney General Warren[6] clearly stated that the provisions of the Act were not directed at the confiscation of enemy property.[7] In fact Warren, in speaking of the situation of a neutral businessman having both an enemy and a neutral business, said that:

> "If there were no provision for license, it might be necessary to confine your term 'enemy' more closely; but where you have a provision for licensing anything that would be otherwise unlawful, then the necessity for making a very restricted definition of the term 'enemy' disappears, and you had better make your definition of 'enemy' broad enough to cover the necessities of the situation, but not broad enough to cover the injustice of the British blacklisting practices." (Senate Hearings, p. 135)

[5] Hearings Before the House Committee on Interstate and Foreign Commerce on H R. 4704, 65th Cong., 1st Sess. 5-6 (1917).

[6] Senate Hearings, p. 132.

[7] For further support for the view that Congress did not contemplate confiscation, see also House Rep. 85, 65th Cong., 1st Sess. 1 (1917); and S. Rep. 113, 65th Cong., 1st Sess. 6-7 (1917).

In other words, at the time of the First World War, Congress, in enacting the Trading with the Enemy Act, was concerned only with a control mechanism which could be applied to enemies. In the Second World War, for purposes of control, the enemy concept was discarded and the control mechanism extended to "foreign nationals" by the amendment of Section 5(b) of the Act.

Petitioner entertains no doubt concerning the Government's power to regulate alien owned property in wartime. *Propper* v. *Clark*, 337 U.S. 472, 69 S. Ct. 1333, 93 L. ed. 1480 (1949). But when it is advocated that definitions used for regulatory purposes may also be used as definitions of enemy for confiscation purposes, a serious question arises. In *Clark* v. *Uebersee Finanz Korp.*, 332 U.S. 480, 92 L. ed. 88, 68 S. Ct. 174 (1947), the Government contended that amended Section 5(b), which used the term "foreign national" to define persons subject to regulation during World War II, had, in effect, limited the class of persons who were entitled to the return of their vested property, so that "foreign nationals" were ineligible to sue under Section 9(a) of the Act. Although the Government did not go so far as to advocate that this new regulatory authorization amended the definition of enemy so as to confiscate the property of all foreign nationals, it did contend it justified the retention and use of any foreign owned property. If this contention had been sustained, very substantial property rights of foreign nationals would have been adversely affected by denying them return of their specific property and relegating them to their remedy in the Court of Claims. However, this Court refused to accept the Government's position and held that unless Congress had specifically

made clear its intention to authorize the Executive to retain and use all property owned by "foreign nationals", that term could not be used to defeat a claim for return under Section 9(a) of the Act.

In the instant case the Government is attempting to use the phrase "doing business within" as a justification for confiscation. Even assuming *arguendo* that the meaning of the phrase was broadened beyond the common law meaning because of the licensing provisions of the Act, the legislative history shows that it was intended merely as a definition of enemy for purposes of regulation. If, as this Court held in *Uebersee*, a regulatory authorization may not be used in a way different from that intended by Congress where substantial property rights will be adversely affected, it would appear to be an *a fortiori* proposition that a phrase intended by Congress for purposes of regulation only cannot be used to uphold confiscation.

The legislative history shows that "enemy" as defined in Section 2 of the Act was intended for regulatory purposes only. The policy of confiscation was proclaimed in Section 39. But, this Court held in *Guessefeldt* that the section's no return provision only applied "to those German and Japanese nationals otherwise ineligible to bring suit under § 9(a)." Since a person not an enemy or ally of enemy as defined in Section 2(a) is eligible to bring a 9(a) action, and lacking a clear and unequivocal Congressional mandate to do otherwise, it is submitted that for purposes of confiscation, Section 2(a) must be read as stating the common law rule.

B. If Ambiguities Exist in the Legislative History, They Should Be Resolved Against Confiscation Unless the Exigencies of War Require Otherwise.

In petitioner's view, the legislative history shows no mandate from Congress, let alone a clear one, authorizing the confiscation of property such as is here in question. Assuming *arguendo*, however, that the legislative history is considered ambiguous so that it is questionable whether the phrase "doing business within" enemy territory was intended to be sufficiently broad to include Carlo as an enemy for the purpose of confiscating his American property, it is submitted that any such ambiguities should be resolved in favor of petitioner unless it can be shown that the exigencies of war required the confiscation of this property. See *Silesian American Corp.* v. *Clark*, *supra*, and *Hirabayashi* v. *United States*, *supra*. This is so because a clear Congressional mandate authorizing confiscation is required. *Brown* v. *U. S.*, *supra*. Interpreting ambiguities against confiscation is within Mr. Justice Frankfurter's admonition in *Guessefeldt* v. *McGrath*, *supra*, at p. 319:

> "Considering that confiscation is not easily to be assumed a construction that avoids it and is not barred by a fair reading of the legislation is invited."

A fair reading of the statute does not bar a construction that the phrase "doing business within" enemy territory does not make Carlo an enemy for the purpose of confiscating his American property. If, however, we go beyond that and assume that the exigencies of war could require that ambiguities be resolved in favor of confiscation, the policies which this Government

followed with respect to the American property of neutrals who clearly were doing business within enemy territory during the last war show that the exigencies of war did not require the confiscation of Carlo's property.

It was never the policy of this Government to seize, let alone confiscate, neutral property on the basis of "doing business within" enemy territory. And this for good reason, as shown by the case of Switzerland which was completely surrounded by the enemy. Its alternative to national starvation was to deal with Germany and Italy and countries occupied by them. It is notorious that in the four years during which Switzerland was completely surrounded by enemy territory, Swiss firms were generally actively engaged in trade with enemy territory, and had much more extensive contacts and relationships with enemy territory than the minimal contacts which Carlo had with Italy. If it had been the Government's policy to seize foreign property on the basis of "doing business within" enemy territory, and if the minimal contact which the courts below have held to constitute "doing business within" enemy territory in the instant case were used as a standard for seizure, practically all neutral businessmen who had property in the United States would not only have had it seized but confiscated as well because under those standards they were enemies. However, the fact is that the Government has embarked on no such policies.

During the last war, the Government published a "Proclaimed List of Certain Blocked Nationals" which listed the names of persons and firms believed, after investigation, to have close ties in or with enemy coun-

tries or persons or businesses therein." If the term "doing business within" is to be given the meaning ascribed to it by the courts below, then most if not all of the persons appearing on that list were enemies and their property in the United States was subject to confiscation. However, the fact is that the Government did not even embark on a program of vesting those properties much less confiscate them.[2] If there was no exigency of war requiring such confiscation, how can it be contended that the exigencies of war, many years after hostilities have ceased, dictate that the instant property be confiscated?

The Government should not be heard to say that the exigencies of war require confiscation in the instant case. The simple fact of the matter is that the property here in question was seized on the grounds that it belonged to Carlo's brother and sister, German residents and admitted enemies. However, when Carlo claimed the property as his own, the Government defended against his action brought under Section 9(a) of the Act on the grounds that he was an enemy by virtue of having done business within enemy territory. In other words, the Government sought to create a new definition of enemy which it had not heretofore adopted for confiscatory purposes, and use it as a technical defense to make a technical enemy out of a neutral resident who had committed no hostile act, rather

[1] Presidential Proclamation No. 2497, July 17, 1941, 6 Fed. Reg. 3555 (1941). The Proclaimed List of Certain Blocked Nationals with its cumulative revisions was withdrawn on July 8, 1946; 11 Fed. Reg. 7567. For its history and scope see 15 Dept. of State Bull. 112 (1946).

[2] Annual Report, Alien Property Custodian, pp. 8-9 (1944).

than face the simple issue of whether he was the true owner of the property. Clearly, then, the Government is not doing this for wartime purposes. It is applying a new definition of enemy to a neutral to avoid paying just compensation for property which it seized as belonging to another. In this case there is no exigency of war — there is only an exigency of litigation.

CONCLUSION

Carlo was not an enemy in fact. He has been held to be a technical enemy with respect to his vested American property because of his one-half ownership of, and supervision over, or power to supervise, an enemy enterprise which did business in Italy during the war but which was totally unconnected with his American property. At common law under those circumstances his American property had non-enemy status and was protected by the Fifth Amendment to the Constitution as the property of a friendly alien.

Protection of the Fifth Amendment could only be removed by a clear mandate from Congress in the exercise of the war power authorizing confiscation *and* upon a showing that such confiscation was reasonably necessary in the interest of the national security. In the most unfavorable light to petitioner, the Congressional authority is unclear and there is absolutely no showing that the national security required the confiscation. Moreover, a fair reading of the Act would offer a construction that the property in question was not removed from the protection afforded by the Fifth Amendment and thus would avoid deciding the Constitutional question posed.

The Court below in its decision has violated petitioner's right to protection under the Fifth Amendment. The constitutional question decided is one of great significance which should be reviewed by this Court.

Wherefore petitioner prays that a writ of certiorari may issue

Respectfully submitted.

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APPENDIX



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,199

HORST VON HENNIG, Ancillary Executor of the Estate of Carlo von Wedekind, Deceased, *Appellant*,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *Appellee*.

No. 16,201

ROBERT F. KENNEDY, Attorney General of the United States, as Successor to the Alien Property Custodian, *Appellant*,

v.

HORST VON HENNIG, Ancillary Executor of the Estate of Carlo von Wedekind, Deceased, *Appellee*.

Appeals from the United States District Court for the District of Columbia

Decided October 19, 1961

Mr. James H. Mann, with whom *Mr. John W. Pehle* was on the brief, for appellant in No. 16,199 and appellee in No. 16,201.

Mr. Irving Jaffe, Attorney, Department of Justice, with whom *Mrs. Mary P. Clark* was on the brief, for appellee in No. 16,199 and appellant in No. 16,201.

Before EDGERTON, WASHINGTON, and BASTIAN, *Circuit Judges*.

PER CURIAM: The plaintiff executor of Carlo von Wedekind has appealed from a judgment of the District Court

dismissing on the merits an action to recover certain property vested by the Alien Property Custodian on the ground that plaintiff's decedent was not authorized by Section 9(a) of the Trading with the Enemy Act of 1917, 40 STAT. 419, as amended, 50 U.S.C. App. § 9(a), to claim the vested property because he was resident outside the United States (in Switzerland) and doing business in Italy during the war years, and was an "enemy" as defined in Section 2(a) of the Act. The District Court's findings of fact and conclusions of law are reported at 187 F. Supp. 914 (1960).[1]

We have reviewed with care the record and appellant's contentions. We are unable to say that the District Court clearly erred in its findings or was wrong in its conclusions.

There is abundant evidence that plaintiff's decedent, the original plaintiff, exercised exclusive supervision for himself and the other owner over the firm of Carlo Wedekind & Company, a *societa in nome collettivo* doing business in Italy, though he may not have followed in detail the operations of the business. In addition to the matters referred to by the District Court, the record shows that he fixed the remuneration of Mueller, the firm's manager in Italy, and insofar as it involved a monthly bonus of 200 Swiss francs, paid it himself (apparently all during the war years) through Fides A.G., a Swiss firm which he dominated and controlled. As late as 1940 he advanced needed funds to the Italian firm; Mueller received instructions or directives for running the firm only from him; prior to the outbreak of the war in Europe, he made frequent visits to Italy to confer with Mueller about the firm's business. It seems also that he must have retained continuing power to revoke the authority delegated to Mueller

[1] The Government filed a protective cross-appeal with respect to the District Court's holding that the original plaintiff was not doing business in Germany during the war years. In view of our conclusion on the principal appeal, it is unnecessary to decide the questions raised in the cross-appeal, No. 16,201.

and to appoint a new manager. The original plaintiff's active supervision of the business prior to the war was clearly shown to exist, and although during the war period his visits to Italy ceased and his correspondence with Mueller was perhaps more limited,[2] he did not show that his powers of supervision over the business were materially changed.[3] And he admittedly had unlimited personal liability for the firm's debts, making his identity with its business even clearer.[4] We think that under all the circumstances the original plaintiff could properly be found to be doing business in Italy during wartime; and hence to be an "enemy" under the Act. Cf. *The William Bagaley*, 72 U.S. (5 Wall.) 377 (1866).

The judgment is

Affirmed.

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[2] The record contains two letters from Mueller to plaintiff written in 1940, one written in 1941, one written in 1942, and one written in 1943. It also contains a letter from plaintiff to Mueller written in 1941. These letters refer to others which are not in evidence.

[3] Compare Uebersee Finanz Korporation, v. Brownell, 133 F. Supp. 615, 620 (D.D.C. 1955), *aff'd sub nom.* von Opel v. Brownell, 100 U.S. App. D.C. 341, 244 F. 2d 789, *cert. denied*, 355 U.S. 878 (1957).

[4] *A società in nome collettivo*—such as the firm here involved—is neither a partnership nor a corporation under Italian law, according to the testimony of the expert witnesses; in addition to provision for it, Italian law provides for general partnerships, corporations limited in shares (or closely held corporations), and general stock corporations. As the District Court pointed out, the *società* has some characteristics of corporations under American law concepts, but because of its unlimited personal liability feature, it is far more analogous to a partnership.

Judgment

This appeal and cross-appeal came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the judgment of the District Court involved on the appeal and cross-appeal is affirmed for the reasons set forth in the opinion of this court this day filed.

Per Curiam.

Dated: October 19, 1961.

APPENDIX B

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Trading With the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 2(a), 9(a), and 39:

Sec. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and

naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * *

SEC. 9(a). Any person not an enemy or ally of the enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after filing of such application or if the claimant shall have filed the notice as above required and shall have made no appli-

cation to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

SEC. 39. No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or

interest therein shall be covered into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of section 32 of this Act or of the Philippine Property Act of 1946.